

THE HONORABLE BENJAMIN H. SETTLE

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

LESLIE WHITE

Plaintiff,

vs.

ETHICON, INC.,

Defendant.

Case No. 2:20-cv-00952-BHS

DEFENDANT ETHICON, INC.'S  
MOTION ON AMOUNT OF  
ATTORNEY FEES AND COSTS

NOTED FOR: APRIL 8, 2022

DEFENDANT.'S MOTION ON AMOUNT OF  
ATTORNEY FEES AND COSTS  
(Case No. 2:20-cv-00952-BHS)

LAW OFFICES  
**CALFO EAKES LLP**  
1301 SECOND AVENUE, SUITE 2800  
SEATTLE, WASHINGTON 98101-3808  
TEL (206) 407-2200 FAX (206) 407-2224

Pursuant to the Court’s February 28, 2022 Order (Dkt. No. 127), awarding Defendant Ethicon, Inc. (“Ethicon”) its attorney fees in connection with opposing Plaintiff’s motion to continue trial, Ethicon moves the Court for an award of reasonable attorney fees in the amount of \$5,816.60 from Plaintiff’s counsel.

## I. BACKGROUND

As the Court is aware, on February 20, 2022, Plaintiff asked the Court to continue the trial again, based on conflicts that should have been evident to Plaintiff’s counsel at, or shortly after, the time the Court set the case schedule in October 2021. *See* Pl.’s Mot. to Continue Trial and Extend All Pretrial Deadlines (“Pl.’s Mot. to Continue”) (Dkt. No. 120). Ethicon opposed and cross-moved for dismissal pursuant to Rule 41(b), in light of Plaintiff’s repeated delays in the case. Def.’s Resp. in Opp’n to Pl.’s Mot. to Continue Trial and Extend All Pretrial Deadlines and Cross-Mot. to Dismiss Pursuant to Fed. R. Civ. P. 41(b) (Def.’s Resp. to Pl.’s Mot. to Continue) (Dkt. No. 121) at 2.

In its February 28, 2022 Order, the Court ruled that Plaintiff did not establish good cause for a continuance and denied Plaintiff’s Motion. Order Denying Pl.’s Mot. to Continue (Dkt. No. 127) at 2–3. The Court outlined Plaintiff’s “dilatory behavior” and found that Plaintiff had “delay[ed] the procedure of this case” and “impeded Ethicon’s ability to prepare for trial.” *Id.* The Court denied Ethicon’s Cross-Motion to Dismiss but, pursuant to its inherent powers, ordered Plaintiff’s counsel “to pay the reasonable attorney fees and costs associated with Ethicon’s response to her motion to continue.” *Id.* at 4 (citing *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (“Federal courts possess certain inherent powers, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That authority includes the ability to fashion an appropriate sanction for conduct which abuses the judicial process.” (internal quotations omitted))); *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1088 (9th Cir. 2021) (“A district court may, among other things, dismiss a case in its

entirety, bar witnesses, exclude other evidence, award attorneys' fees, or assess fines.").

## II. ARGUMENT

The question of whether Plaintiff's counsel must pay attorney fees and costs has been determined; the only remaining issue is the amount. As explained below, reasonable attorney fees for Ethicon total \$5,816.60, based on 16.2 hours of work performed by national counsel Butler Snow LLP and local counsel Calfo Eakes LLP in preparing Ethicon's Response in Opposition to Plaintiff's Motion to Continue Trial and Extend All Pretrial Deadlines and Cross-Motion to Dismiss Pursuant to Fed. R. Civ. P. 41(b) (Dkt. No. 121). Ethicon is not seeking taxable costs as provided in 28 U.S.C. § 1920 in the instant motion.

### A. Legal Standard

Washington law governs the method by which a federal district court calculates an award of attorney fees and costs. *See Mangold v. California Pub. Utilities Comm'n*, 67 F.3d 1470, 1478 (9th Cir. 1995). Washington courts apply the "lodestar" method to calculate an award of attorney fees. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash. 2d 581, 593 (1983). The lodestar fee is determined by multiplying the number of hours counsel reasonably spent on the matter by a reasonable hourly rate. *See id.*; *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008) (citing *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n. 4 (9th Cir. 2001)); *see, e.g., Carbon v. Seattle Reprod. Med. Inc. PS*, No. 219CV01491RAJJRC, 2020 WL 5513600, at \*1 (W.D. Wash. Sept. 14, 2020). This lodestar figure is "presumptively reasonable." *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 488 (9th Cir. 1988).

### B. Under the lodestar method, Ethicon seeks to recover \$5,816.60 in attorneys' fees.

The Declarations of Mitchell K. Morris and Andrew DeCarlow are attached hereto. Mr. Morris, of Butler Snow LLP, and Mr. DeCarlow, of Calfo Eakes LLP, are the attorneys who primarily incurred fees in connection with the instant matter. Their respective Declarations provide detail on the name, position, and experience of each attorney, together with his current hourly

1 billing rate, number of hours billed, and total fees. A summary is as follows:

<u>Name</u>	<u>Years of Experience</u>	<u>Hourly Rate</u>	<u>Hours Billed</u>	<u>Fees</u>
Mitchell K. Morris	Attorney, 17 years	\$368.00	13.7	\$5,041.60
Andrew DeCarlow	Attorney, 7 years	\$310.00	2.5	\$775.00
<b>TOTAL</b>				<b>\$5,816.60</b>

7 The total requested amount of \$5,816.60 is reasonable, both in terms of the hourly rates  
 8 (\$368/hour and \$310/hour) and hours expended (16.2 hours), as explained below. While other  
 9 attorneys and staff also incurred fees and expenses related to Plaintiff's Motion, Ethicon only now  
 10 seeks to recover the more limited fees for those two attorneys who directly and primarily handled  
 11 Ethicon's Response and Cross-Motion to Dismiss.

12 **1. Ethicon's attorneys' hourly rates of \$368/hour and \$310/hour are reasonable.**

13 "Where the attorneys in question have an established rate for billing clients, that rate will  
 14 likely be a reasonable rate." *Bowers*, 100 Wash. 2d at 597. When assessing reasonableness, "the  
 15 relevant community is the forum in which the district court sits." *Camacho*, 523 F.3d at 979. The  
 16 Court may also "rely 'on its own knowledge and experience' in determining the reasonableness of  
 17 an hourly rate." *Lauer v. Longevity Med. Clinic PLLC*, No. C13-0860 JCC, 2016 WL 2595122, at  
 18 \*3 (W.D. Wash. May 4, 2016) (quoting *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011)).  
 19 It may further consider, *inter alia*, "the level of skill required by the litigation, time limitations  
 20 imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the  
 21 undesirability of the case." *Zones, Inc. v. Evergreen Info. Tech. Servs., Inc.*, No. 2:17-CV-00457-  
 22 RAJ, 2019 WL 6894676, at \*2 (W.D. Wash. Dec. 18, 2019) (citing *Bowers*, 100 Wash. 2d at 597);  
 23 *see also* Wa. R. Prof. Conduct 1.5(a) (listing factors considered in determining fee reasonableness,  
 24 including "whether the fee is fixed," the "nature and length of the professional relationship with  
 25 the client," and the "experience, reputation, and ability of the lawyer").

Based on the established billing rate and the experience and qualifications of Ethicon's attorneys, the hourly rates charged were reasonable for the tasks performed. Butler Snow attorney Mitchell K. Morris and Calfo Eakes attorney Andrew DeCarlow billed the time at issue. *See* Morris Decl.; DeCarlow Decl. Mr. Morris has practiced law for 17 years. Morris Decl., ¶ 3. He is a partner in Butler Snow's Richmond, Virginia, office and is a member of the litigation department, practicing within the Products, Catastrophic, and Industrial Litigation and Commercial Litigation groups. *See Id.* ¶ 3, Ex. 1 (Mr. Morris's Butler Snow Profile). He graduated from Washington & Lee University School of Law in 2005, was admitted to the Virginia Bar in 2005, and joined Butler Snow in 2018. *Id.*, ¶¶ 3-5. Mr. Morris has significant experience in class action, pharmaceutical, and multi-district litigation, including with Ethicon's defense of the pelvic mesh litigation since 2019. *Id.* Mr. DeCarlow has practiced law for around seven years. DeCarlow Decl., ¶ 3. He is an associate at Calfo Eakes, in Seattle, Washington. *Id.* ¶ 3, Ex. 1 (Mr. DeCarlow's Calfo Eakes Profile). Mr. DeCarlow's practice focuses, in large part, on civil litigation. *Id.* He graduated from University of California, Los Angeles, School of Law in 2015, was admitted to the California Bar in 2015, was admitted to the Washington Bar in 2017, and joined Calfo Eakes in 2017. *Id.*, ¶¶ 3-4. Mr. DeCarlow has represented Ethicon in this matter since June 2020. *Id.*

The hourly rate for work performed by Mr. Morris in this case is \$368.00. Morris Decl., ¶¶ 6-7. This is the rate Butler Snow has charged for Mr. Morris's work in connection with certain pelvic mesh matters since January 1, 2019. *Id.* Notably, Mr. Morris's rate for this matter represents a substantial reduction of his standard hourly rate in light of the nature of the relationship between Butler Snow and Ethicon. *Id.* The hourly rate performed by Mr. DeCarlow in this case is \$310.00. DeCarlow Decl., ¶¶ 5-6. This is the rate Calfo Eakes has charged for Mr. DeCarlow's work in connection with this matter since June 9, 2020. *Id.* Like Mr. Morris's rate, Mr. DeCarlow's rate represents a substantial reduction of his standard hourly rate in light of the nature of the relationship between Calfo Eakes and Ethicon. *Id.* The reasonableness of Ethicon's attorneys' rates is further

supported by the Declaration of Calfo Eakes founding member Patricia A. Eakes, attached hereto,, and this District’s case law. *See Zones Inc.*, 2019 WL 6894676, at \*2 (collecting cases detailing reasonable rates, including reasonable rates of \$500 per hour).

**2. Ethicon’s attorneys’ expenditure of 16.2 hours is reasonable.**

“The hours reasonably expended must be spent on claims having a ‘common core of facts and related legal theories.’” *Zones, Inc.*, 2019 WL 6894676, at \*1 (quoting *Martinez v. City of Tacoma*, 81 Wash. App. 228, 242–43 (1996)); *see Webb v. Sloan*, 330 F.3d 1158, 1168–69 (9th Cir. 2003); *see also Garcia v. Serv. Emps. Int’l Union*, 856 F. App’x 105, 108 (9th Cir. 2021) (affirming award of attorney fees as sanction for discovery violations). “[A]ttorneys seeking fees must provide ‘reasonable documentation of the work performed’ in order to allow the court to assess whether the number of hours expended was reasonable.” *Zones, Inc.*, 2019 WL 6894676, at \*2.

As set forth in their Declarations, Mr. Morris and Mr. DeCarlow spent a total of 16.2 hours preparing Ethicon’s Response and Cross-Motion to Dismiss over several days during the week of February 14, 2022. Morris Decl. ¶ 6; Ex. 2: DeCarlow Decl., ¶ 5. This time was expended on research, drafting, and editing with respect Ethicon’s 13-page response and cross-motion. Ethicon’s attorneys’ rates and hours were therefore reasonable, necessary, and specific to the filing for which the Court awarded attorney fees.

**III. CONCLUSION**

Ethicon seeks to recover from Plaintiff’s counsel a total of \$5,816.60 in reasonable attorney fees. Ethicon prays for all other relief to which it is entitled.

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1 DATED this 24<sup>th</sup> day of March, 2022.

2 **CALFO EAKES LLP**

3 By: s/ Andrew DeCarlow

4 Angelo J. Calfo, WSBA# 27079

5 Patty A. Eakes, WSBA #18888

6 Damon C. Elder, WSBA #46754

7 Andrew DeCarlow, WSBA #54471

8 1301 Second Avenue, Suite 2800

9 Seattle, WA 98101

10 Phone: (206) 407-2200

11 Fax: (206) 407-2278

12 Email: [angeloc@calfoeakes.com](mailto:angeloc@calfoeakes.com)

13 [pattye@calfoeakes.com](mailto:pattye@calfoeakes.com)

14 [damone@calfoeakes.com](mailto:damone@calfoeakes.com)

15 [andrewd@calfoeakes.com](mailto:andrewd@calfoeakes.com)

16 **BUTLER SNOW LLP**

17 By: s/ Jordan N. Walker

18 Jordan N. Walker, Admitted *Pro Hac Vice*

19 1020 Highland Pkw., Suite 1400

20 Ridgeland, MS 39157

21 Phone: (601) 985-4643

22 Email: [jordan.walker@butlersnow.com](mailto:jordan.walker@butlersnow.com)

23 By: s/ Margaret Loveman

24 Margaret Loveman, Admitted *Pro Hac Vice*

25 1819 Fifth Avenue North

Birmingham, AL 35203

Phone: (205) 297-2241

Email: [margaret.loveman@butlersnow.com](mailto:margaret.loveman@butlersnow.com)

**TUCKER ELLIS LLP**

By: s/ Michael Zeller

Michael Zellers, Admitted *Pro Hac Vice*

Mollie Fleming Benedict, Admitted *Pro Hac Vice*

515 So. Flower St., 42<sup>nd</sup> Floor

Los Angeles, CA 90071

Phone: (213) 430-3400

Email: [michael.zellers@tuckerellis.com](mailto:michael.zellers@tuckerellis.com)

[mollie.benedict@tuckerellis.com](mailto:mollie.benedict@tuckerellis.com)

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LAW OFFICES  
**CALFO EAKES LLP**  
1301 SECOND AVENUE, SUITE 2800  
SEATTLE, WASHINGTON 98101-3808  
TEL (206) 407-2200 FAX (206) 407-2224

**CARNEY BADLEY SPELLMAN PS**

By: s/ Michael B. King

Michael B. King, WSBA #14405

701 5<sup>th</sup> Avenue, Suite 3600

Seattle, WA 98104

Phone: (206) 622-8020

Email: [king@carneylaw.com](mailto:king@carneylaw.com)

*Attorneys for Defendant Ethicon, Inc.*